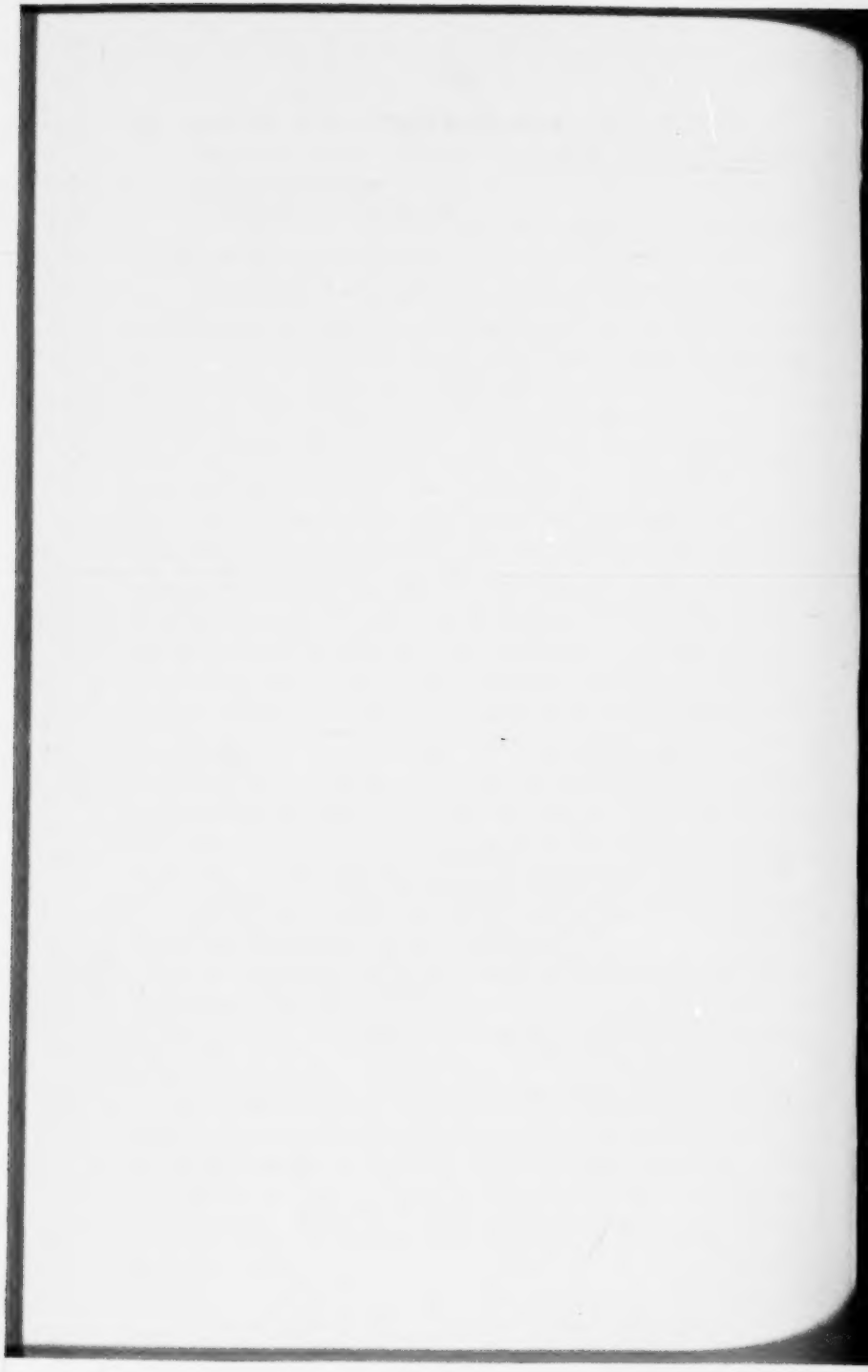

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In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 533.

THE LINCOLN ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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January 30, 1950.

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In view of the assumptions underlying the Commissioner's argument opposing review, it should be noted that there is no question here whether the payments are "ordinary and necessary expenses" of this taxpayer's business. That they *are* "ordinary and necessary expenses" was settled by judgment of the Court of Appeals nearly three years ago. The Commissioner sought no review. By every test that judgment is final and beyond review by any court.[1] And it was reaffirmed upon the second appeal. Said the Court of Appeals:

"On review by this Court, we held that the Tax Court was in error in holding that such payments were not

[1] Although one would not be aware of it from the brief filed here by the Commissioner, the 1940 payment which was originally in question in this case, was allowed by the Commissioner after the first decision of the Court of Appeals. And he did not challenge it upon the second review. Instead, he expressly limited his appeal to 1941 (R. Vol. IV, pp. 83, 88).

ordinary and necessary expenses paid for carrying on taxpayer's trade or business" (R. Vol. IV, p. 122).

In both reviews the court refused to hold the payments constituted compensation. Said the court:

"We * * * reject the Commissioner's * * * contention that although we classified the payments as ordinary and necessary expenses they were also compensatory in nature" (R. Vol. IV, p. 124).

Thus the simple question this case raises is whether payments conceded to be "ordinary and necessary expenses" of a business are deductible in computing income subject to tax.

Congress has given the answer in five lines. It has said deduction "*shall be* allowed" for:

"*All* the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered" (Internal Revenue Code, § 23(a)(1)(A)).

That Congressional command ought to end the case. Clearly, "where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it." *Helvering v. Wood* (1940), 309 U. S. 344, 347; *United States v. Cumberland Public Service Company*, No. 214, October Term 1949, decided January 9, 1950.

And where a court, after 30 years, as here, finds in a statute a new meaning heretofore concealed from all readers, which vitally affects every business filing a tax return, and which, if it be law, gives to the Commissioner a new, vast and terrifying power—which Congress by appropriate language has seen fit to withhold—the case obviously is one which should be reviewed.

The Commissioner hints that if the question is reviewed he will wish to file a cross petition to review other issues, *i.e.*, those decided nearly three years ago in the

first judgment of the Court of Appeals. It is plain that the meaning of the statute here in question can be determined without cross petition by the Commissioner, and moreover, that if filed, it would come too late. *Dickinson v. Petroleum Conversion Corporation,* No. 150, October Term 1949, decided January 16, 1950.

Before a change so vast, in so important a statute, is written into law this Court should examine what has been done.

The writ should issue.

Respectfully submitted,

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January 30, 1950.